FILE COPY

FEB 8 1947

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 908 21

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, LOCAL LODGE NO. 926, ET AL.,
Petitioners,

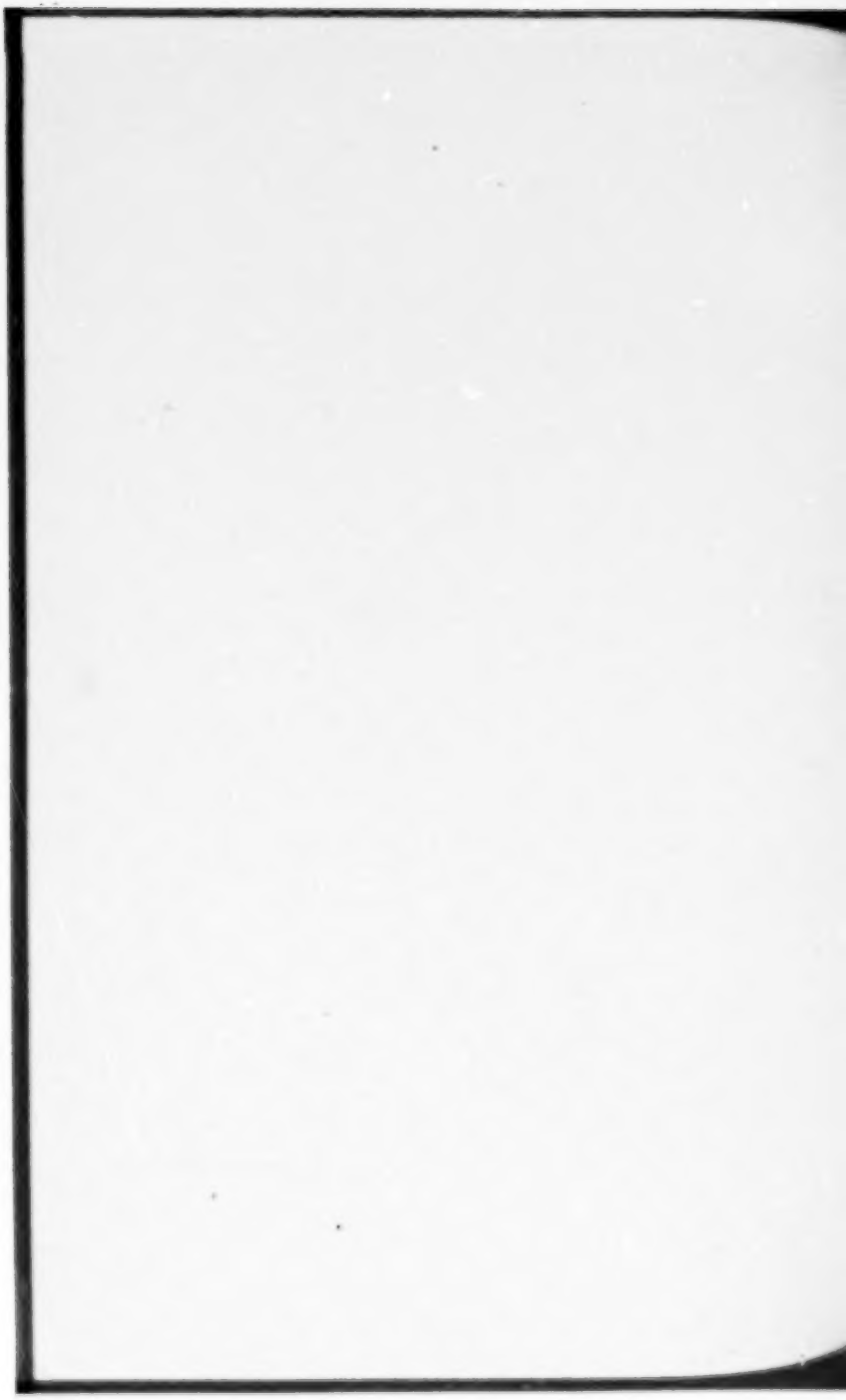
vs.

TOLEDO, PEORIA & WESTERN RAILROAD, A CORPORATION, AND FARMERS GRAIN COMPANY, A CORPORATION, ET AL.,
Respondents.

BRIEF OF RESPONDENT RAILROAD IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

DONALD A. MORGAN,
1125 First National Bank Bldg.,
Peoria 2, Illinois,
Attorney for the Respondent, Toledo, Peoria & Western Railroad.

THE DARNELL-WARREN PRINTING COMPANY, 310 WEST MONROE, CHICAGO



BLEED THROUGH= POOR COPY

INDEX.

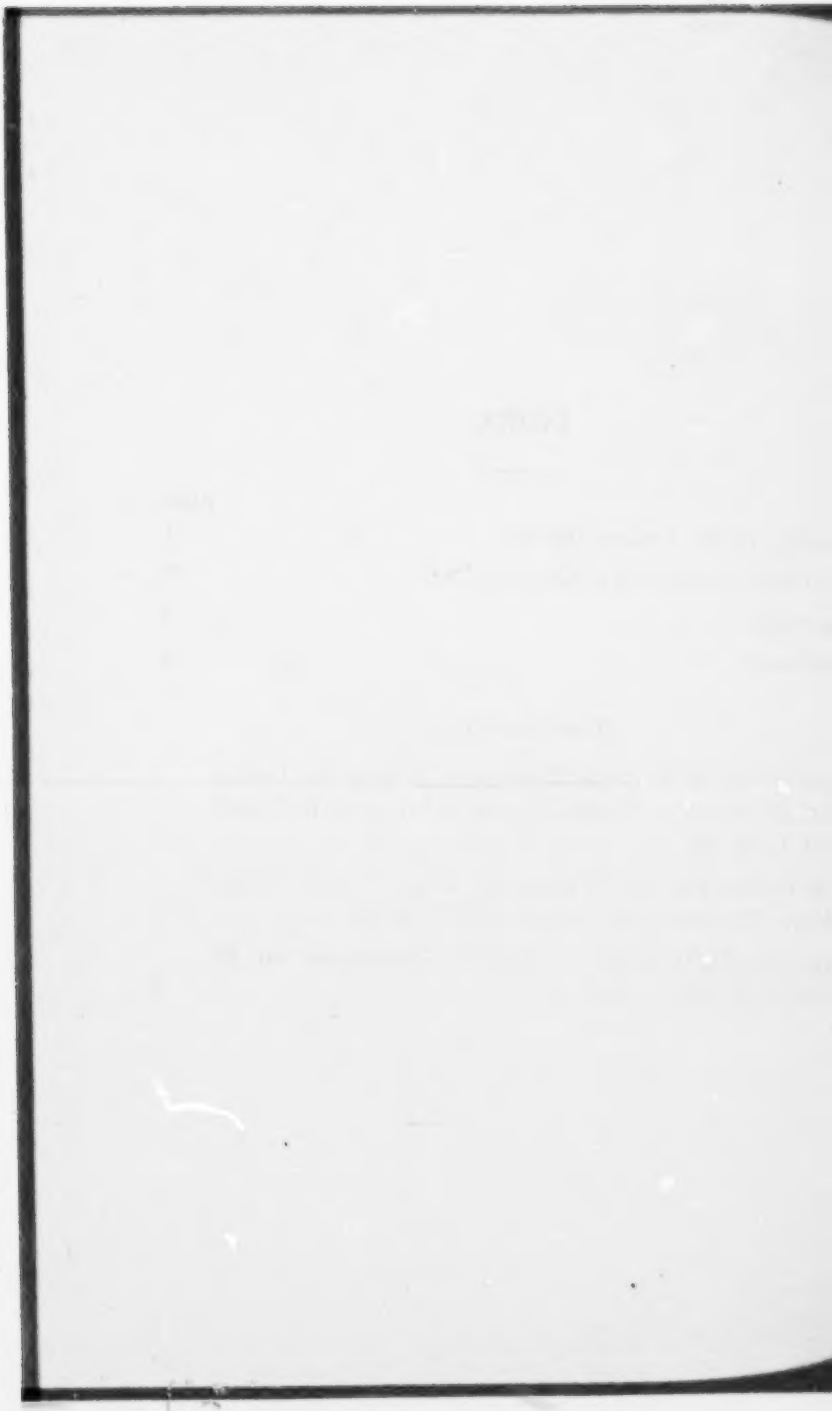
	PAGE
Opinions of the Courts Below	1
Additional Statement of the Case	2
Argument	5
Conclusion	9

Table of Cases.

Brotherhood of Railroad Trainmen, Enterprise Lodge, No. 27, et al. v. Toledo, Peoria & Western Railroad, 321 U. S. 50 3

Milk Wagon Drivers' Union, etc., et al. v. Lake Valley Farm Products, Inc., et al., 311 U. S. 91 ..... 7, 8

Virginian Railway Co. v. System Federation No. 40, 300 U. S. 515 6



BLEED THROUGH- POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 908

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, LOCAL LODGE NO. 926, ET AL.,
Petitioners,

vs.

TOLEDO, PEORIA & WESTERN RAILROAD, A CORPORATION, AND FARMERS GRAIN COMPANY, A CORPORATION, ET AL.,
Respondents.

BRIEF OF RESPONDENT RAILROAD IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals is reported in 158 F. (2d) 109, and the opinion of the District Court is reported in 66 F. Supp. 845. Inasmuch as no printed record has been prepared in this case, references to these opinions in this Brief are to the published reports.

ADDITIONAL STATEMENT OF THE CASE.

There being no printed record, Respondent Railroad is unable to furnish record references for such additional facts as are essential for this Court's consideration.

This case is one between Respondent Shippers as representatives of the public on one side and Petitioners and Respondent Railroad on the other. It is not an action between Petitioners and Respondent Railroad, and Respondent Railroad is not asking relief or review.

The suit was commenced by twenty-four shippers, along the line of Respondent Railroad, to secure equitable relief for the wrong suffered by them in the virtual cessation of transportation service on the only railroad available to them. Respondent Railroad, and the labor organizations who are now the Petitioners, were co-defendants in that suit to enforce the rights of the public established by the Interstate Commerce Act and other statutes. The evidence disclosed that railroad transportation service was not being furnished to the shippers and that they had suffered, and were daily suffering, large monetary losses and irreparable damages. The District Court concluded that the shippers were entitled to relief, appointed a Receiver to operate the railroad and issued an injunction restraining "all defendants, persons, firms and corporations" from interfering with the Receiver's possession or operation of the railroad. (66 F. Supp. 845, 856.)

The Circuit Court of Appeals agreed with the District Court that the shippers were entitled to relief, but held that under the established authorities, a receivership was improper. (158 F. (2d) 109, 116, 117.) The Circuit Court of Appeals ordered the issuance of a mandatory injunc-

BLEED THROUGH– POOR COPY

tion requiring Respondent Railroad to continue the operation of its road, and directed the issuance of the same kind of ancillary injunction protecting the operation as the District Court had ordered for the protection of the operation by the Receiver. (158 F. (2d) 109, 118, 119.)

Petitioners in their statement dwell upon difficulties between themselves and Respondent Railroad. Those difficulties are immaterial to any of the issues in this case between Respondent Shippers on the one side and Petitioners and Respondent Railroad on the other.

It should be sufficient, for the purposes of this case, to state that this Court held in 1944 that Respondent Railroad's activities constituted full compliance with all of the requirements of the Railway Labor Act and of Section 8 of the Norris-LaGuardia Act, except a willingness to arbitrate. *Brotherhood of Railroad Trainmen, Enterprise Lodge, No. 27, et al.* v. *Toledo, Peoria & Western Railroad*, 321 U. S. 50, 64. Since that time, Respondent Railroad has offered to arbitrate before an arbitrator appointed either by the senior federal judge of the district, or by the trial judge, or by the senior circuit judge, or by the Illinois Commerce Commission, or by the National Mediation Board under the terms of the Railway Labor Act. Petitioners rejected all of these arbitration proposals. In this connection, the Circuit Court of Appeals concluded:

> "Under these circumstances which are undisputed, we think it cannot be said that appellant (Respondent Railroad) failed either to negotiate, mediate or arbitrate as contemplated by the former decision in this case by the Supreme Court." (158 F. (2d) 109, 117.)

The opinion and judgment of the Circuit Court of Appeals entered September 4, 1946, referred to at page 6 of the Petition, were withdrawn and vacated on November 20, 1946. The only effective opinion and judgment of that

Court in this case are those entered November 20, 1946, which clearly order that a mandatory injunction be issued by the District Court, directing Respondent Railroad to furnish service as required by the Interstate Commerce Act, and providing that Respondent Railroad be "protected by an injunction against interference by anyone in the operation of the road." (158 F. (2d) 109, 118, 119.)

The orders of the District Court entered pursuant to the mandate of the Circuit Court of Appeals issued November 27, 1946, were not any part of the record considered by that Court in reaching its decision of November 20, 1946, and no record embodying them has been certified to this Court. The District Court record of which they are a part discloses that Petitioners have perfected an appeal from those orders to the Circuit Court of Appeals, and that said appeal is presently pending. Petitioners' references to those orders in their petition and brief to this Court are clearly improper. (Petition and brief, pp. 6, 16-19.)

BLEED THROUGH– POOR COPY

ARGUMENT.

This argument is directed only to a refutation of the points made by Petitioners as reasons for granting a writ of certiorari.

Respondent Railroad did not, and clearly could not, ask for the issuance of an order directing it to operate and provide transportation service, but there can be no denial of the right of the shippers to such relief. Respondent Railroad was unable to furnish effective transportation service before the issuance of the mandatory injunction, in spite of its efforts so to do, because of the breakdown of interchange with other railroads. Experience has shown, however, that complete service can be furnished under the mandatory injunction. For that reason, Respondent Railroad is unwilling, as anomalous as that may be, to voice any objection to this effective remedy for the wrong done to the shipping public, even though this remedy is an injunction directed specifically against Respondent Railroad.

Petitioners did not seek a review of the ancillary injunction issued by the District Court to protect the operation by the Receiver, yet Petitioners now contend that an important federal question is presented by the issuance of the same ancillary protection for the Court's mandatory injunction. Manifestly, the only distinction between the two must lie in the fact that the Receiver was expected to accede to Petitioners' every demand. The question of the validity of the two orders providing ancillary protection, in all other respects, under the Railway Labor Act and the Norris-LaGuardia Act, if they apply, is precisely the same. The ancillary protection directed by the Circuit Court of Appeals was issued not at the request of Respondent Rail-

road, but in connection with the remedy afforded to the original plaintiffs in accordance with their prayer for relief and to protect the order of court and make it effective. The course of conduct of Petitioners clearly shows that the "important question of federal law" is of consequence only when they are unable either to force settlement on their own terms or to prevent the interchange of traffic between Respondent Railroad and connecting carriers, all without regard for the consequences to the shipping public.

This case involves no novel or important question of law, but rather only the difference of opinion as to which remedy is to be afforded for the paramount right of the shipping public. The receivership ordered by the District Court was legally impossible under the long established authorities relied upon by the Circuit Court of Appeals. (158 F. (2d) 109, 116, 117.) The mandatory injunction ordered by the Circuit Court of Appeals is the traditional exercise of the inherent power of a court of equity and has proved to be an effective remedy for the shippers in this case. The ancillary protection in each case was the exercise of the power of a court of equity to prevent the frustration of its decrees.

The supposed conflict pointed out by Petitioners of the decision of the Circuit Court of Appeals with the Railway Labor Act and the decision of this Court in *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, is not real. The relative rights of Petitioners and Respondent Railroad are not affected by the decision of the Circuit Court of Appeals. Respondent Railroad retains the alternative of agreeing to the demands of the Petitioners or of attempting to replace Petitioners' adherents with others. Petitioners and their adherents retain the alternative of accepting the terms offered by Respondent Railroad or of collectively refusing to work for it. The opportunity for

FILED THROUGH POOR COPY

both parties to achieve some middle ground by collective bargaining is fully preserved. The rights of either party are qualified only to the extent necessary to assure the service to which the shippers are entitled under the terms of the Interstate Commerce Act. That limitation is inherent in the question of whether or not the public is entitled to transportation service under that Act, and that question has been answered in the affirmative by both courts below.

Petitioners contend that the case involves a "labor dispute" and for that reason the decision of the Circuit Court of Appeals is in conflict with the Norris-LaGuardia Act and the decision of this Court in *Milk Wagon Drivers' Union, etc., et al. v. Lake Valley Farm Products, Inc., et al.*, 311 U. S. 91. The most obvious defect in that contention is the fact that the issues in this case do not really involve any dispute at all. This case involves the question of whether the shippers are entitled to transportation service; Petitioners, Respondent Railroad and both lower courts have conceded that they are. The fact that some other dispute may exist between two co-defendants does not mean that the case involves that dispute. There is nothing in the Norris-LaGuardia Act to indicate that it was intended to prevent a court of equity from enforcing a statutory right merely because two of the defendants were engaged in a labor dispute. That Act must have been intended only to curtail the use of the injunction as a strike-breaking weapon in the hands of the employer involved. That was the situation in every case which has come before this Court for decision under that Act. That was the situation in *Milk Wagon Drivers' Union, etc., et al.* v. *Lake Valley Farm Products, Inc., et al.*, 311 U. S. 91.

The District Court and the Circuit Court of Appeals both necessarily believed that the Norris-LaGuardia Act, and the decisions of this Court construing that Act, were not applicable to this case; otherwise, the District Court could not have issued the ancillary order protecting the operation

under the receivership, and the Circuit Court of Appeals could not have directed the issuance of the ancillary order protecting the operation under the mandatory injunction. The Norris-LaGuardia Act, if applicable, would be jurisdictional and the relief ordered by both courts would be unavailable, regardless of the consequences to the public. The orders were undoubtedly issued by both courts, not as restraints on a labor organization engaged in a labor dispute, nor for the purpose of forcing a settlement of the dispute, but as a necessary adjunct to the relief to which they each believed the shippers were entitled.

Clearly the Norris-LaGuardia Act would be applicable in this case if it could be shown that the shippers were acting collusively for Respondent Railroad. The whole record, however, adequately disproves that remote possibility, particularly the fact that the shippers asked for and originally obtained a judicial seizure of Respondent Railroad for the purpose of settling the dispute between the defendants on Petitioners' terms.

Petitioners also contend that the Norris-LaGuardia Act is applicable for the reason that Respondent Shippers have "a direct or indirect interest in the railway industry." It is apparent from the whole record, however, that the Shippers' interest is only in the continued operation of the railroad under the Interstate Commerce Act. Respondent Shippers have no interest whatsoever in any labor dispute between Petitioners and Respondent Railroad, nor in the terms of any settlement between them. In *Milk Wagon Drivers' Union, etc., et al.* v. *Lake Valley Farm Products, Inc., et al.*, 311 U. S. 91, all of the plaintiffs therein were vitally concerned in a labor dispute between the plaintiff dairies and the defendant union and in the terms of the settlement between them. That vital interest in the labor dispute and its outcome has been present in every case which this Court has decided was governed by the Norris-

BLEED THROUGH– POOR COPY

LaGuardia Act. Only injunctive relief in protection or promotion of that interest is restricted by that Act.

Therefore, it is the earnest contention of Respondent Railroad that the Norris-LaGuardia Act is wholly inapplicable to this action by representatives of the shipping public to secure their right to transportation service, and that no conflict exists between the decision of the Circuit Court of Appeals and any decision of this Court.

Conclusion.

It is respectfully submitted that the relief granted to Respondent Shippers by the Circuit Court of Appeals is proper under the laws of the United States and the decisions of this Court, that the relief is an effective remedy for the wrong suffered by Respondent Shippers, and that the case should not be reviewed by this Court. The petition for a writ of certiorari should be denied.

DONALD A. MORGAN,

Attorney for the Respondent, Toledo, Peoria & Western Railroad.